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No. 88-63

Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1988

DEPARTMENT OF PUBLIC SAFETY,
COMMONWEALTH OF THE NORTHERN
MARIANA ISLANDS,

Petitioner,

v.

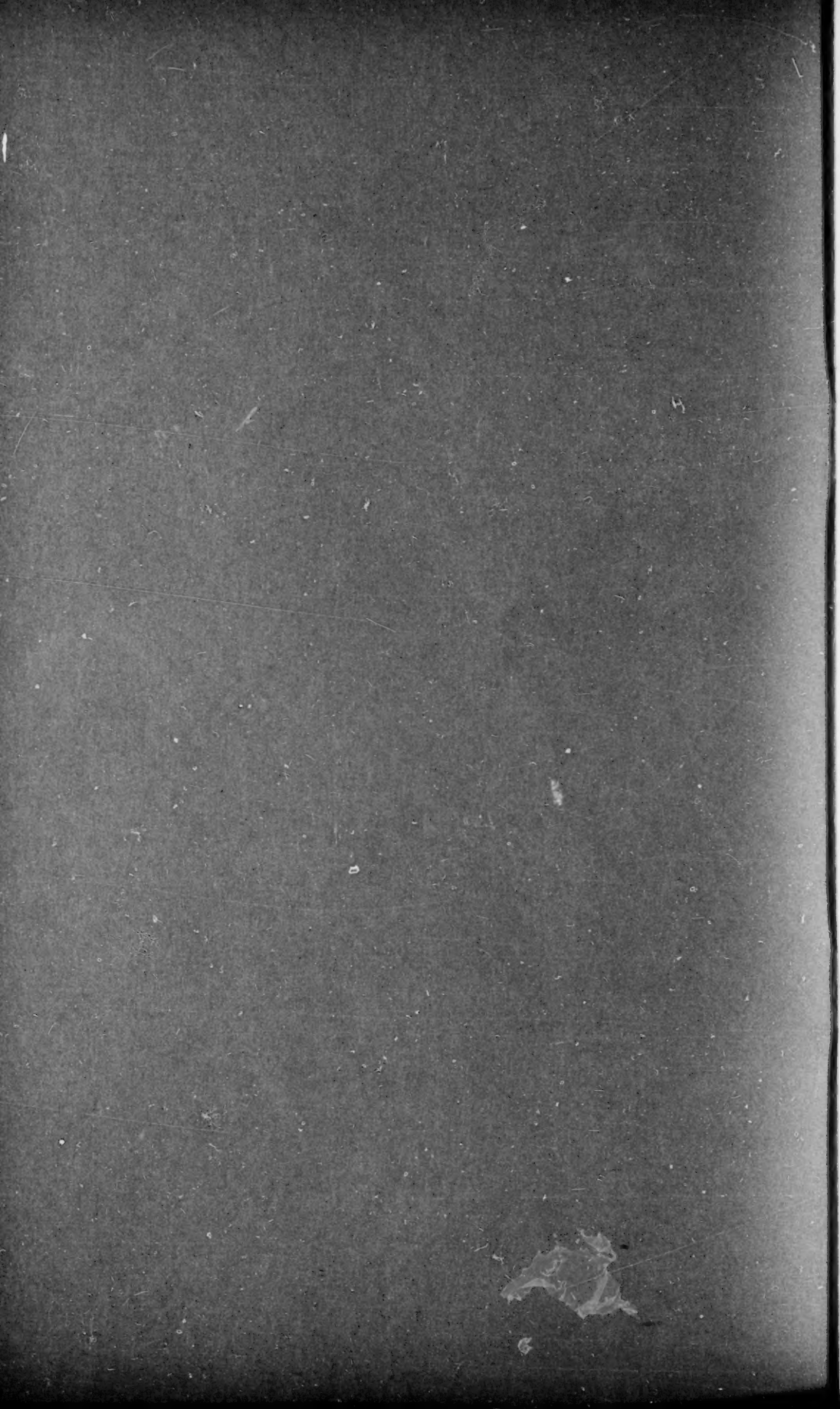
LAWRENCE M. FLEMING,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION

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**QUESTIONS PRESENTED FOR REVIEW CONTAINED
IN THE GOVERNMENT'S PETITION***

QUESTION 1. Does the jurisdiction of the United States District Court for the Northern Mariana Islands extend to suits by citizens against the Commonwealth of the Northern Mariana Islands?

QUESTION 2. Where the Eleventh Amendment to the United States Constitution bars suit in federal court based on 42 USC Section 1983, against the several states and the Territory of Guam, is the Commonwealth of the Northern Mariana Islands similarly immunized from such suits under the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America?

* Rule 28.1 is not applicable to this case.

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REFERENCE TO OFFICIAL REPORTS OF OPINIONS

Lawrence M. Fleming v. Department of Public Safety,
Commonwealth of the Northern Mariana Islands, 837
F.2d 401 (9th Cir., 1988)

STATEMENT OF GROUNDS FOR JURISDICTION

Date of Opinion – January 21, 1988

Date of amended Opinion – April 8, 1988

Date of Order denying rehearing – April 11, 1988

Statutory Provision Conferring Jurisdiction – 28 USC Sec-
tion 1254(1)

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES

Covenant to Establish a Commonwealth of the Northern
Mariana Islands in Political Union with the United States
of America, reprinted as amended at 48 USC Section 1681
(West 1987).

ARTICLE I

Political Relationship

Section 101. The Northern Mariana Islands upon termina-
tion of the Trusteeship Agreement will become a self-
governing commonwealth to be known as the "Com-
monwealth of the Northern Mariana Islands," in political
union with and under the sovereignty of the United
States of America.

Section 102. The relations between the Northern Mariana
Islands and the United States will be governed by this

Covenant which, together with those provisions of the Constitution, treaties and laws of the United States applicable to the Northern Mariana Islands, will be the supreme law of the Northern Mariana Islands.

Section 103. The people of the Northern Mariana Islands will have the right of local self-government and will govern themselves with respect to internal affairs in accordance with a constitution of their own adoption.

Section 104. The United States will have complete responsibility for and authority with respect to matters relating to foreign affairs and defense affecting the Northern Mariana Islands.

Section 105. The United States may enact legislation in accordance with its constitutional processes which will be applicable to the Northern Mariana Islands, but if such legislation cannot also be made applicable to the several States the Northern Mariana Islands must be specifically named therein for it to become effective in the Northern Mariana Islands. In order to respect the right of self-government guaranteed by this Covenant the United States agrees to limit the exercise of that authority so that the fundamental provisions of this Covenant, namely Articles I, II and III and Sections 501 and 805, may be modified only with the consent of the Government of the United States and that Government of the Northern Mariana Islands.

Article IV
Judicial Authority

Section 402.

(a) The District Court for the Northern Mariana Islands will have the jurisdiction of a district court of the United States, except that in all causes arising under the Constitution, treaties or laws of the United States it will have jurisdiction regardless of the sum or value of the matter in controversy.

Article V
Applicability of Clauses

Section 501.

(a) To the extent that they are not applicable of their own force, the following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several States: Article I, Section 9, Clauses 2, 3 and 8; Article I, Section 10, Clauses 1 and 3; Article IV, Section 1 and Section 2, Clauses 1 and 2; Amendments 1 through 9, inclusive; Amendment 13; Amendment 14, Section 1; Amendment 15, Amendment 19; and Amendment 26; provided, however, that neither trial by jury nor indictment by grand jury shall be required in any civil action or criminal prosecution based on local law, except where required by local law. Other provisions of or amendments to the Constitution of the United States, which do not apply of their own force within the Northern Mariana Islands, will be applicable within the Northern Mariana Islands only with the approval of the

Government of the Northern Mariana Islands and of the Government of the United States.

Section 502.

(a) The following laws of the United States in existence on the effective date of this Section and subsequent amendments to such laws will apply to the Northern Mariana Islands, except as otherwise provided in this Covenant:

(1) those laws which provide federal services and financial assistance programs and the federal banking laws as they apply to Guam; Section 228 of Title II and Title XVI of the Social Security Act as it applies to the several States; the Public Health Service Act as it applies to the Virgin Islands; and the Micronesian Claims Act as it applies to the Trust Territory of the Pacific Islands;

(2) those laws not described in paragraph (1) which are applicable to Guam and which are of general application to the several States as they are applicable to the several States; and

(3) those laws not described in paragraphs (1) or (2) which are applicable to the Trust Territory of the Pacific Islands, but not their subsequent amendments unless specifically made applicable to the Northern Mariana Islands, as they apply to the Trust Territory of the Pacific Islands until termination of the Trusteeship Agreement, and will thereafter be inapplicable.

42 USC Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or

the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be laible to the party injured in an action of law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Respondent, Lawrence M. Fleming commenced this action pursuant to 42 USC Section 1983 in the United States District Court for the Northern Mariana Islands, alleging that the Commonwealth of the Northern Mariana Islands (CNMI), through its Department of Public Safety, had deprived him of liberty and property rights without due process of law and in violation of equal protection of the laws. These were based upon allegations made within the department regarding Fleming's alleged drug trafficking which were false and were known to be false by the persons in charge of hiring at the time he was refused employment.

A jury returned a verdict in favor of Fleming in the amount of \$80,000. On appeal to the Ninth Circuit Court of Appeals, the jury award was set aside on the basis that Fleming had proved no cognizable injury. The Court of Appeals further determined that the Commonwealth was subject to suit under 42 USC Section 1983 and could not

avail itself of immunity under the Eleventh Amendment to the United States Constitution. Such immunity had been waived under the terms of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (Covenant).

This case presents issues unique to the Commonwealth, of application of 42 USC Section 1983 and the Eleventh Amendment to the United States Constitution.

Jurisdiction in the District Court was alleged pursuant to 48 USC Section 1694(a); 28 USC Section 1343; 28 USC Section 1331, and 42 USC Section 1983.

ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

A. Jurisdiction of the federal court extends to actions by a citizen against the Commonwealth of the Northern Mariana Islands (CNMI).

Petitioner divides its argument into three parts. The first part delineating a brief history of the relationship between the CNMI and the United States and the second part regarding negotiation of the Covenant emphasizing the trust obligations of the United States and the road to self government, respondent does not dispute. Fleming wishes to direct his argument in this section to the CNMI's discussion of common law and Eleventh Amendment immunity.

The CNMI opens its discussion establishing a clear distinction between the unincorporated Territory of

Guam and the CNMI. Fleming adopts and emphasizes the historical and current political difference in status between the two entities.

The Ninth Circuit held that Eleventh Amendment immunity was not available under Covenant Section 501(a) nor under Covenant Section 502(a2). The Ninth Circuit further held that there is an implied waiver of Commonwealth sovereign immunity from suits arising under federal law in the federal courts. Petitioner's assertion of the Ninth Circuit's position being a waiver of all sovereign immunity is not accurate. The Ninth Circuit was speaking only to immunity from federal suits in federal courts and not a blanket waiver of all sovereign immunity possessed by the Commonwealth. The Ninth Circuit further pointed out that "there is simply no meaningful distinction between Eleventh Amendment immunity and common law sovereign immunity insofar as federal suits are concerned. See *Demerey v. Kupperman*, 735 F.2d 1139, 1145 (9th Cir. 1984) (citing *Pennhurst*), cert. den. 469 US 1127 (1985)."

Petitioner's initial argument for applicability of the Eleventh Amendment is that Article III of the United States Constitution was also not enumerated in the Covenant yet is clearly applicable to the Commonwealth. It is submitted that Article III of the United States Constitution was not enumerated in the Covenant because the United States District Court for the Northern Mariana Islands is not an Article III court. The Northern Mariana District Court is alternatively an Article I court or created pursuant to Article IV, Section 3 as is the District Court of Guam. *Guam v. Olsen*, 431 US 195 (1977). Jurisdiction of the Northern Mariana District Court is similar to that of

Guam in the sense that Congress must specifically provide for the jurisdiction in these courts and the general laws applicable to federal district courts do not apply without such specific reference. See *Chase Manhattan Bank (National Association) v. South Acres Development Company*, 434 US 236 (1978).

Petitioner's argument that the United States has failed to fulfill its trust obligations by permitting an implied waiver of sovereign immunity by the CNMI is not correct. It should be pointed out that the citizens of a Commonwealth while within the trust were ruled by officials imposed on them from the outside with no ultimate authority to either enact their own laws or change those officials or secure redress in the courts. It would be a natural desire of Commonwealth citizens to permit access to the federal courts and require their government to comply with federal laws, particularly laws relating to discrimination.

The further argument that the Court of Appeals read the Covenant to be an enumeration of powers granted to the Commonwealth and those that were not granted were retained by or granted to the United States is not the analysis of the Court of Appeals. The application of 42 USC Section 1983 to the Commonwealth is not a grant of authority to the United States. It is a grant of authority to its own citizens to secure redress for wrongs committed against them by their own government.

The CNMI argues that the Tenth Amendment to the United States Constitution, while conceding it would be inappropriate to enumerate in the Covenant, maintains that its principle of retained powers is applicable in our

situation. The CNMI then raises the spectre of a "wholesale relinquishment of sovereignty" now being imminent.

The Court of Appeals restricted its decision to a lack of immunity under the Eleventh Amendment. The court held that this immunity had been waived by a failure to include a specific reference to the Eleventh Amendment within Covenant Section 501(a). There can be no question that a State may waive its immunity. *Clark v. Barnard*, 108 US 436; *Gunter v. Atlantic Coast R. Company*, 200 US 273. Further, the Congress has made States liable and penetrated Eleventh Amendment immunities in the case of federal legislation under the Commerce Clause, *Parden v. Terminal Railway Company*, 377 US 184 (1964) and under Title VII (42 USC Section 2000e et seq.), *Fitzpatrick v. Bitzer*, 427 US 445 (1976). That the citizens of the Commonwealth, in approving the Covenant, would have decided to waive Eleventh Amendment immunity to suits by its own citizens in federal court under federal law is totally unsurprising.

The CNMI attempts to differentiate, in the current situation, between Eleventh Amendment immunity and the Commonwealth's sovereign immunity. Whether a State permits suit to be brought against it in its own courts is not determinative of whether Eleventh Amendment immunity is relinquished from suit in federal courts. *Edelman v. Jordan*, 415 US 651 (1974); *Chandler v. Dix*, 194 US 590 (1904).

B. 42 USC Section 1983 applies to the Commonwealth of the Northern Mariana Islands.

1. 42 USC Section 1983 applies to the Commonwealth through Covenant Section 502(a)(2).

The Commonwealth argues that 42 USC Section 1983 does not apply to it because the Ninth Circuit in *Ngiraingas v. Sanchez*, ___ F.2d ___ slip opinion (9th Cir., 86-2840, June 7, 1988) found that the unincorporated Territory of Guam was not "person" as defined in the act. The Commonwealth reliance upon *Ngiraingas* is misplaced. The Ninth Circuit in that case took great pains to differentiate the Territory of Guam from States or a Commonwealth within the federal system and those entities administered under concepts of free association or under the Trusteeship or Covenant. The Ninth Circuit found that the Territory of Guam was totally under the control of the federal government and without sovereign status. Such is not the situation with the Commonwealth. The Ninth Circuit in this case again observed that Trust Territories are sui generis and each one must be viewed independently to determine the rights granted to its citizens, the rights reserved to itself and those possessed by the federal government. In light of the totally different nature of the unincorporated Territory of Guam and the Commonwealth, the petitioner's reading of Section 502(a)(2) could not be correct. It is submitted that a fair reading of Section 502(a)(2) is that federal laws which generally apply to the States and to the Territory of Guam will apply to the Commonwealth. None of these three types of political entities are the same, however, thus it is not possible to treat them in identical fashion. For instance, if a State of the union waives its Eleventh Amendment

immunity under a particular federal law, does this mean that the Commonwealth waives that immunity or remains with the other States in maintaining immunity. The construction of Covenant Section 502(a)(2) as called for by the Commonwealth will create a series of absurd situations that will rely for construction upon political entities that were created and which exist in a manner entirely different than that of the Commonwealth.

2. The CNMI is a "person" under 42 USC Section 1983.

The Commonwealth assertion that there is a split of authority among the Courts of Appeal as to whether a State is a "person" under 42 USC Section 1983 is not correct. Courts of Appeal have not been able to directly address this question since the matter of eleventh Amendment immunity precludes such a consideration.

Petitioner here asks this Court to decide whether a State is a person based upon a fact situation that does not involve a State. The final determination by this Court, if this petition is accepted, will be subject to constant distinctions by litigants in future cases. The precedential value of a ruling involving a unique Commonwealth is exceedingly limited. Further, unless a State waives its Eleventh Amendment immunity, the issue of Section 1983 liability will not be addressed because of prior rulings by this court. *Pennhurst State School and Hospital v. Halderman*, 465 US 89 (1984); *Alabama v. Pugh*, 438 US 781 (1978). Even assuming that the Commonwealth were the functional equivalent of a State, it has waived its Eleventh Amendment immunity by virtue of Covenant Section

501(a) and thus is exposed to suit under federal law in a federal court.

The Commonwealth argues that the Ninth Circuit has reduced it to the status of a local county government or the creature of a superior sovereign. The Court of Appeals has done no such thing. Court of Appeals has analyzed a treaty between the people of the Commonwealth and the United States and found there to be a clear waiver of Eleventh Amendment immunity. Covenant Section 501(a) reads in part that:

"The following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several states . . . "

It would have been exceedingly simple to add Amendment Eleven to the list of constitutional provisions enumerated. The Commonwealth can provide no answer as to why this was not done.

CONCLUSION

The Court should deny Certiorari to review this case.

Rule 17 of the Rules of this Court establish the general character of reasons that will be considered in granting a Petition for Certiorari. The Commonwealth has failed to establish a basis for granting of its petition. Any decision this Court renders in this case will have virtually no precedential value due to the unique circumstances of the Commonwealth and provide little guidance to the Courts of Appeal. While application of 42 USC Section

1983 to the States is undeniably an important issue to be decided, unless there is radical change in this Court's view as to Eleventh Amendment immunity of States, this case is not the vehicle for such a decision.

By permitting citizens of the Commonwealth and other persons residing within the Commonwealth the right to maintain 42 USC Section 1983 actions against the government, the United States has at long last begun to fulfill its trust obligations by providing access to an independent judiciary to review abuses of its government.

Respondent prays that this Court deny Certiorari and dismiss the petition.

Respectfully Submitted,

DOUGLAS F. CUSHNIE

Attorney for Respondent